

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ENGLISH SPORTS BETTING, INC.	:	CIVIL ACTION
and DENNIS J. ATIYEH	:	
	:	
v.	:	
	:	
CHRISTOPHER "STING" TOSTIGAN,	:	
WWW.PLAYERSODDS.COM, and	:	
WWW.THEPRESCRIPTION.COM, c/o	:	
Ken Weitzner	:	No. 01-2202

M E M O R A N D U M

WALDMAN, J.

March 15, 2002

Plaintiffs have asserted defamation claims against defendants arising from three articles authored by defendant Tostigan and posted on the defendant websites which provide sports and gambling information. Plaintiff Atiyeh is a citizen of Pennsylvania and owner of English Sports Betting, Inc. That corporation is organized under the laws of Jamaica and has its principal place of business in Montego Bay. Defendant Tostigan is a resident of New York.¹ Defendant www.playersodds.com is a Canadian corporation "believed" by plaintiffs to be located in Toronto.² Defendant www.theprescription.com is an Australian corporation and is located in Chesapeake, Virginia.

¹There is no allegation as to Mr. Tostigan's citizenship. He was served by certified mail in New York.

²Plaintiffs acknowledge that they cannot find the physical location of this defendant and have never effected service upon it. It appears that the actual web site no longer exists.

Subject matter jurisdiction is asserted pursuant to 28 U.S.C. § 1332. Presently before the court is plaintiffs' motion for entry of a default judgment against defendant Tostigan.

The pertinent facts alleged by plaintiffs are as follow.

Plaintiffs own and operate a web site for users to place off-shore sports bets on line. Christopher Tostigan, under the pseudonym "Sting," wrote a column captioned "Sting's Offshore Insider" which appeared on the playersodds web site. He also occasionally writes columns for the prescription web site.

On November 15, 2000, an article by Mr. Tostigan entitled "English Sports Betting Owner Indicted After Long History of Encounters With the Law" was posted on www.playersodds.com. In the article, Mr. Tostigan cited an Allentown Morning Call account of Mr. Atiyeh's recent federal grand jury indictment, along with his brother, on charges of money laundering and then continued:

Dennis Atiyeh's dark past includes two murders; one involving a patron at his old nightclub; the other, one of Dennis' former employees who went off with the customer list, and opened his own book on the Island of Jamaica called Tuff Turf. Atiyeh has been arrested for violent assaults more than half a dozen times.

In this article, Mr. Tostigan also discusses the contemporaneous legal difficulties of Mr. Atiyeh's cousin, Randall Hadeed, who was then under investigation for allegedly making terroristic

threats on the answering machine of Ken Weitzner, the president of www.theprescription.com. Mr. Tostigan wrote:

[Mr. Hadeed's] voice was positively identified and should he be charged, Hadeed could possibly face a life sentence along with his cousin Dennis, who is expected to become PITCHER to Hadeed, the CATCHER.

Plaintiffs allege that the references to pitcher and catcher are vulgar slang for sodomy.

On November 28, 2000, an article by Mr. Tostigan entitled "Who Got Plucked for Thanksgiving . . . and Who is Doing the Plucking?" was posted on www.theprescription.com. In the article, Mr. Tostigan wrote "[a]s has been noted here and elsewhere, the Feds got themselves one of the biggest birds out there in Dennis Atiyeh, the super heavyweight of offshore (and, ahem onshore) gambling."³ On November 30, 2000, another article by Mr. Tostigan was posted on the same web site discussing Mr. Atiyeh's legal difficulties in which he is characterized as a "bully" and "scumbag."⁴

Plaintiffs filed their complaint on May 4, 2001. Defendant Tostigan was served with a copy of the summons and complaint by certified mail, return receipt requested, on May 8, 2001. The return receipt indicates that the mailing was received

³ In an exhibit of plaintiffs, they acknowledge that at the time Mr. Atiyeh was under federal indictment but state that he was subsequently acquitted in the spring of 2001.

⁴ The latter reference appears in the context of a left-handed compliment. The author states that "since appearing on the offshore gaming scene a few years ago, I have had the displeasure of encountering bigger scumbags than Atiyeh."

on May 12, 2001. In the nine months that have followed, Mr. Tostigan has not entered an appearance.

Plaintiffs have never requested entry of default from the clerk of court. Although a plaintiff requesting the entry of a default judgment typically has obtained the entry of a default from the clerk of the same court, the clerk's entry of default is largely a formality. See Pinaud v. County of Suffolk, 52 F.3d 1139, 1152 n.11 (2d Cir. 1995).

Personal jurisdiction, including effective service of process, is a prerequisite for a valid default judgment. See, In Re Tuli, 172 F.3d 707, 712 (9th Cir. 1999) ("judgment entered without personal jurisdiction over parties is void"); Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 940 (5th Cir. 1999) (when court lacks personal jurisdiction any default judgment is void); Dennis Garberg & Assocs. v. Pack-Tech International Corp., 115 F.3d 767, 771 (10th Cir. 1997) (court obligated to ensure it has personal jurisdiction over defendant before entering default judgment).⁵

Fed. R. Civ. P. 4(e)(2) provides that when a plaintiff serves original process upon a defendant found in any judicial district, such process may properly be effected by applying the

⁵ Plaintiffs submitted various exhibits and a six-page memorandum in support of their motion. They address the issue of effective service of process but do not address the other aspects of personal jurisdiction.

law of the state in which the district court sits. In Pennsylvania, service of process on an out-of-state defendant is complete when a copy of the process mailed to the defendant "by any form of mail requiring a receipt signed by the Defendant or his authorized agent" is delivered. Pa. R. Civ. P. 403, 404. Service of process thus appears to have been proper. That, however, does not end the inquiry.

A court may exercise personal jurisdiction over a non-forum resident only when the forum state's long-arm statute so authorizes and when an exercise of such jurisdiction comports with due process. Pennsylvania's long-arm statute authorizes the exercise of personal jurisdiction over out-of-state defendants to the full extent permitted by the Constitution. See 42 Pa. C.S.A. § 5322(b); Pennzoil Products Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998); John Hancock Property & Cas. Co. v. Hanover Ins. Co., 859 F. Supp. 165, 168 (E.D. Pa. 1994). The statutory and constitutional assessments of jurisdiction are thus conflated. See Arch v. American Tobacco Co., 984 F. Supp. 830, 835 (E.D. Pa. 1997); Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1065 (M.D. Pa. 1993).

Whether an exercise of personal jurisdiction comports with due process depends upon "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Where the defendant is a nonresident

of the forum, the plaintiff must show that the defendant has purposefully directed its activities toward the residents of the forum state, see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), or otherwise has "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also IMO Industries, Inc. v. Kiekart AG, 155 F.3d 254, 259 (3d Cir. 1998).

General personal jurisdiction may be established by showing that a defendant maintains continuous and systematic contacts with the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984); Field v. Ramada Inn, 816 F. Supp. 1033, 1036 (E.D. Pa. 1993). Contacts are continuous and systematic if they are "extensive and pervasive." Id. The standard for general jurisdiction thus "is much higher than that for specific jurisdiction." Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1067 (M.D. Pa. 1993). See also American Cyanamid Co. v. Eli Lilly and Co., 903 F. Supp. 781, 786 (D.N.J. 1995); Sears, Roebuck & Co. v. Sears, PLC, 744 F. Supp. 1297, 1304 (D. Del. 1990). Plaintiff has not suggested that Mr. Tostigan has any, much less continuous and systematic, contacts with Pennsylvania which would provide the basis for an exercise of personal jurisdiction.

Where a plaintiff's cause of action arises out of the defendant's contacts with the forum, a court may exercise specific jurisdiction. See IMO Industries, 155 F.3d 259. To invoke specific jurisdiction, a plaintiff's cause of action must arise from or relate to the defendant's forum related activities such that the defendant should reasonably anticipate being haled into court in the forum. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir.), cert. denied, 498 U.S. 847 (1990). The plaintiff must show that the defendant has constitutionally sufficient minimum contacts with the forum and that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. See IMO Industries, 155 F.3d 259 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

A defendant, however, need not be physically present in the forum. Personal jurisdiction may be exercised over a defendant who has committed an intentional tort when the forum is the focal point of the harm suffered by the plaintiff as a result of that tort and the defendant expressly aimed the tortious conduct at the forum which may thus be said to be the focal point of the tortious conduct. See Remick v. Manfredy, 238 F.3d 248, 258 (3d Cir. 2001); IMO Industries, 155 F.3d 265.

Defamation is an intentional tort. The recipient audience is not linked by geography but by a common interest in off-shore sports gambling. The brunt of any harm suffered by the plaintiff corporation would be in Jamaica. Even assuming that the brunt of any harm suffered by the individual plaintiff would be in Pennsylvania, there is no showing that the defendant expressly aimed the tortious conduct at the forum.

It is not sufficient that the brunt of the harm falls within plaintiff's home forum, even when this was reasonably foreseeable. "There is an important distinction between intentional activity which foreseeably causes injury in the forum and intentional acts specifically targeted at the forum." Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp. 398, 408 (E.D. Pa. 1992). The articles were targeted at the international off-shore gambling community. See Remick, 238 F.3d at 259 (concluding Pennsylvania was not focal point of tortious conduct where defamatory material was published not just in Pennsylvania but throughout the national boxing community and there was no showing of a unique relationship between that community and Pennsylvania).

It appears that the courts in New York would have general personal jurisdiction over Mr. Tostigan.⁶ For whatever

⁶ It appears from plaintiffs' allegations that the offending articles were posted until at least early May of 2001.

reason, plaintiffs elected not to proceed on their claim against him there.⁷ This court, however, lacks personal jurisdiction and it is clear that Mr. Tostigan has not waived this otherwise critical deficiency. Any further litigation of the claim against Mr. Tostigan here would be futile and any judgment rendered against him would be void.⁸

Accordingly, plaintiffs' motion will be denied and the claim against defendant Tostigan will be dismissed without prejudice. An appropriate order will be entered.

⁷ A court in Virginia might also have personal jurisdiction in the circumstances alleged. It appears that Mr. Tostigan was employed by a Virginia corporation to author articles, including the offending articles, for publication. His ongoing commercial relationship with a Virginia-based corporation may constitute a sufficient minimum contact. It appears that in fulfilling his obligation to the Virginia company within the scope of his engagement and in collaboration with that company, Mr. Tostigan facilitated the posting of the offending articles on the company's web site. Plaintiffs' claim against him may reasonably be viewed as arising from or related to his commercial contact with Virginia, and he might reasonably be expected to have to answer with the Virginia defendant in Virginia for an intentional tort committed in collaboration with it. A court in Virginia clearly could adjudicate a claim or third-party claim against Mr. Tostigan by the Virginia corporate defendant arising from or related to their relationship.

⁸ The same deficiency exists with regard to defendant www.playersodds.com which in any event cannot be located, has never been served and has apparently ceased to exist. Consistent with the foregoing, the claim against this defendant will also be dismissed without prejudice.

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Ken Weitzner	:	No. 01-2202

O R D E R

AND NOW, this day of March, 2002, upon
consideration of plaintiffs' Motion for Judgment by Default
against defendant Tostigan (Doc. # 10), consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
DENIED and plaintiffs' claim against defendant Tostigan is
DISMISSED without prejudice for lack of personal jurisdiction.

BY THE COURT:

JAY C. WALDMAN, J.

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AND NOW, this day of March, 2002, as
defendant www.playersodds.com has never been served, cannot be
located and has apparently ceased to exist, and as the court in
any event lacks personal jurisdiction over this defendant on the
claim asserted, **IT IS HEREBY ORDERED** that plaintiffs' claim
herein against defendant www.playersodds.com is **DISMISSED** without
prejudice.

BY THE COURT:

JAY C. WALDMAN, J.